

1 (The following proceedings were then had in open court
2 outside the presence of the jury.)
3 THE COURT ATTENDANT: Please come to order.
4 THE COURT: Ready are we?
5 THE COURT: Can we proceed without Mr. Grossman?
6 MS. KESSLER: Yes.
7 MR. GORDON: Yes.
8 MR. PAUL: Yes.
9 THE COURT: Okay.
10 MR. PAUL: Stipulate.
11 THE COURT: Bring in the jury, please.
12 (The following proceedings were then had in open court in
13 the presence of the jury.)
14 THE COURT: Miss Kessler.
15 THE COURT ATTENDANT: Please come to order. Court is
16 again in session.
17 Q (By MS. KESSLER) Professor Schaller, everyone is
18 accusing me of being a bad influence on you and speaking too
19 quickly, so we're both going to have to try and slow down.
20 A I don't need much encouragement.
21 Q A bad combination.
22 Professor Schaller, before we took the break we were
23 talking about the placement of statements in articles.
24 Do you remember that?
25 A Yes.
26 Q Could you just describe briefly for the jury where
27 industry statements were contained in the articles you
28 reviewed.

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1 A Generally speaking, down in the article, third, fourth
2 paragraph, second page. They tended not to be the lead or the
3 main focus of most stories on health -- the health risks of
4 smoking.
5 Q And in the articles you reviewed in your research for
6 this case, do you have an idea how many contained statements,
7 any statements by the industry?
8 A Oh, you know, my best estimate might be 12, 15 percent,
9 something around that. I'd say more than three-quarters
10 certainly didn't have any.
11 Q Now, Professor Schaller, we talked when you first took
12 the stand today about what you were asked to do in this case.
13 Have you formed an opinion to a reasonable degree of
14 professional certainty, based on your historical analysis,
15 whether ordinary people in the United States have been aware
16 that cigarette smoking may cause or does cause serious risks to
17 health, including lung cancer?
18 A Yes.
19 Q What is your opinion?
20 A My opinion is that there was a great deal of information
21 available and that ordinary people would have been exposed to
22 this information and known that there was a serious risk of
23 health impairment, lung cancer and other diseases associated
24 with using tobacco.
25 Q Have you formed an opinion in this case to a reasonable
26 degree of professional certainty whether ordinary people in the
27 United States have been aware that cigarette smoking can be
28 difficult for some people to quit?

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1 A Yes.
2 Q What is that opinion?
3 A Similarly, that there was a great deal of information
4 available emphasizing the risk that once someone started
5 smoking it could be very difficult to quit.
6 Q And has that been common knowledge?
7 A I believe it has, yes.
8 Q Based on the materials that you reviewed for your
9 historical research project for this case, have you formed an
10 opinion to a reasonable degree of professional certainty about
11 whether any statements made by any of the defendants in this
12 case affected the high levels of awareness among ordinary
13 people about the risks of smoking?
14 MR. PAUL: I'm going to object. Lack of foundation.
15 THE COURT: Sustained.
16 Q (By MS. KESSLER) Dr. Schaller, in your historical
17 research project you considered statements made by the
18 tobacco -- by -- let me start that question again.
19 Dr. Schaller, you've already discussed reviewing a wide
20 variety of materials and information for this case.
21 A Yeah.
22 Q And included in a number of those materials there were
23 sometimes statements by different tobacco companies or tobacco
24 representatives.
25 A Yes.
26 Q And you considered those statements as a historian in
27 forming your opinions for this case; isn't that correct?
28 A I did.

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1 Q Have you formed an opinion to a reasonable degree of
2 professional certainty whether the statements that were in the
3 public domain affected the high levels of awareness among
4 ordinary people about the risks of smoking?
5 MR. PAUL: Objection; lack of foundation.
6 THE COURT: Sustained.
7 MS. KESSLER: Your Honor, may we approach?
8 THE COURT: Yes.
9 (The following bench conference was then had.)
10 THE COURT: Mr. Paul.
11 MR. PAUL: He is a historian here to talk about what was
12 in the common knowledge, as I understand it. Now he's giving
13 professional opinions about how individual people were affected
14 by this and whether or not what the tobacco companies said
15 would affect anybody.
16 Well, he can't give that testimony. He's got no
17 background. He's not a psychologist. He's got no expertise in
18 advertising. All he can testify about is what research he has
19 done and what he has found. That goes to the body of
20 knowledge, not to his ability to give an opinion as to whether
21 or not it would affect somebody one way or the other.
22 MS. KESSLER: And, your Honor, I agree with Mr. Paul,
23 that this witness is not testifying -- is not qualified to
24 testify about how something would have affected a certain
25 person or what it would have meant to a certain person. That
26 is not his testimony. The question I am asking, which he is
27 qualified to answer and give, was whether there was common
28 knowledge on this topic. He is qualified.

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1 THE COURT: He's already testified to that.

2 MS. KESSLER: And, specifically, I'm now asking him if
3 common knowledge was decreased by the tobacco industry's
4 statements that were in the public. I am not asking him about
5 how it affected a certain person or certain -- it's whether or
6 not there was common knowledge because of anything that the
7 tobacco industry -- he is qualified.

8 MR. PAUL: Maybe I should have objected then it was vague
9 and ambiguous. Because he's already testified that it was part
10 of the things that he reviewed, that there was knowledge. He
11 said it was ten to twelve percent of the material that he
12 reviewed, so it is part of the common knowledge. You're asking
13 him now did it really impact the common knowledge, which he's
14 already testified it has affected.

15 THE COURT: I think this question necessarily gets into
16 the realm that Mr. Paul has suggested is objectionable. I
17 agree with that analysis. He's testified as to how this
18 appeared and generally what the common knowledge was. But I
19 think when you get into this additional nuance, you're asking
20 him to testify to matters beyond his expertise. So I'm going
21 to sustain the objection.

22 MS. KESSLER: Thank you.

23 (Bench conference concluded.)

24 Q (By MS. KESSLER) Dr. Schaller, I just want to back up
25 for one second and clear up a small point.

26 You testified before that you would approximate about ten
27 to twelve percent of the articles you reviewed contained any
28 statements by anyone from the tobacco industry; is that

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1 correct?

2 A Yes. Newspaper, magazine articles, yes.

3 Q And that wasn't ten to twelve percent of all the
4 materials you reviewed?

5 A No, no.

6 Q It was just ten to twelve percent of newspaper/magazine
7 articles that contained any statements?

8 A Yes.

9 Q Now, Professor Schaller, you've offered your opinions on
10 common knowledge on the risk of smoking and the difficulty of
11 quitting smoking.

12 Have you prepared a demonstrative that helps show the
13 jury how the levels of awareness on this fact compared to other
14 facts in history?

15 A Yes.

16 MS. KESSLER: Your Honor, we have a demonstrative to
17 help explain this to the jury, which has been marked as
18 Demonstrative 169.

19 (Defendant R.J. Reynolds' Exhibit DEM-000169 was marked
20 for identification.)

21 MS. KESSLER: May we display that?

22 THE COURT: Any objection?

23 MR. PAUL: The first one. No objection.

24 THE COURT: Okay.

25 Q (By MS. KESSLER) Professor Schaller, we've displayed
26 what's been marked as Demonstrative 169. Could you explain to
27 the jury what this shows.

28 A Yes. This is a comparative -- the vertical bars show

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1 comparisons of various facts or information, levels of public
2 awareness. And the first one at 90 percent was -- the Gallup

3 poll found that people had heard or read that cigarette smoking
4 might cause lung cancer. In 1954, their finding was 90
5 percent.

6 In 1983, 89 percent could name Washington as first
7 president of the United States.

8 In 1990, 75 percent knew that an atomic weapon had been
9 used in wartime.

10 In 1996, about 55 percent knew that Jerry Seinfeld was
11 the star of the sitcom Seinfeld.

12 In 1954, same year as the first pole I discussed, 49
13 percent of the people could identify Genesis as the first book
14 of the Bible.

15 In 1958, about 40 percent of the people knew that Bugs
16 Bunny said, "What's up Doc?"

17 And also in 1954, about a third of Americans knew that
18 Jesus had delivered the Sermon on the Mount.

19 Q And so this demonstrative is showing polling results for
20 a number of different questions that were asked?

21 A Yes.

22 Q And what does -- what do these results tell you as a
23 historian?

24 A Well, some of them scare me, but they also tell me that a
25 lot of people knew -- I mean, 90 percent of Americans reported
26 to Gallup in 1954 that they had heard or read that cigarette
27 smoking could cause lung cancer. This is what 90 percent of
28 the public reported having heard or read about.

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1 Q And as a historian, do you have an opinion about how high
2 of a level the 90 percent number is?

3 A Well, it's hard to find a number higher than 90 percent
4 for almost anything to tell you the truth, whether the earth is
5 flat or round, or the sun goes around the earth or vice versa.
6 About 90 percent is about where you top off.

7 I think I just read the other day that 11 percent of
8 people don't believe the astronauts -- American astronauts
9 actually landed on the moon. You know, certain -- a certain
10 percentage just aren't going to believe. Maybe they're
11 contrary, ornery or just goodness knows what.

12 But 90 percent is a historically extraordinary high level
13 of knowledge of anything, most common facts of life.

14 Q And what year was that 90 percent number from?

15 A 1954.

16 Q We'll talk a little bit later about some additional
17 Gallup polls. But for now I wanted to move on to the second
18 part of the opinions you formed in this case.

19 I think you said that there was high awareness, and it
20 was common knowledge about the potential habit-forming nature
21 of tobacco.

22 A Yes.

23 Q Do you have a demonstrative exhibit that will help
24 explain that to the jury?

25 A I do.

26 MS. KESSLER: Your Honor, may we show Demonstrative 302
27 to the jury?

28 (Defendant R.J. Reynolds' Exhibit DEM-000302 was marked
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1 for identification.)

2 MR. PAUL: No objection.

3 THE COURT: Received (sic). Yes.

4 Q (By MS. KESSLER) Professor Schaller, what does this
5 demonstrative show?

6 A These are selections from well known or historically
7 famous people, using some of the terms they used in their
8 writings or in other forms to talk about tobacco.

9 King James in 1604 called it "bewitching," meaning
10 we were entranced by it.

11 Benjamin Rush who was a signer of the Declaration of
12 Independence and the Constitution and leading physician in
13 early America described, "Slaves of the Tobacco Habit."

14 John Quincy Adams, the president of the United States and
15 then later congressman, wrote many letters and articles about
16 "addicted" tobacco users.

17 Henry Ford of mass production of the automobile actually
18 wrote a series of books called "The Little White Slaver,"
19 indicating that tobacco use was a form of enslavement.

20 And then in popular movies and songs in the forties, the
21 terms "nicotine fiend," "nicotine addict" and "nicotine slave"
22 were often used.

23 In magazines, "nicotine fit," or "hooked" or "addicted."

24 And then from the sixties right through the most recent
25 period, advice columnists like Dear Abby and Ann Landers
26 frequently wrote articles and responded to letters from readers
27 heirs talking about chain smoking, addicted to smoking and
28 used those terms of smoking addicts. Ann Landers especially

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1 became famous for crusading against what she saw as the
2 addiction of tobacco.

3 Q Focusing on addiction in your historical review, have you
4 seen different terms applied to the concept of smoking being
5 hard to quit?

6 A You know, people talk in the idiom of the era. We use
7 the language we're familiar with. So in the 19th Century, the
8 term most often used for addiction was "enslavement." That had
9 a pretty strong meaning in 19th Century America, given the
10 legacy of slavery. Tobacco was seen as something literally
11 enslaving people just as, you know, slavery in the United
12 States had existed before the Civil War.

13 And so the terms "addiction," "habituation,"
14 "enslavement," sometimes are used interchangeably, but they
15 also speak to what -- the language we're comfortable with or
16 familiar with in a different time. But the term, I think
17 whatever was used, kind of meant the same thing. It was -- you
18 know, it had a hold on you, and it was very hard to break.

19 Q And are these also some examples of the slang terms you
20 were talking about earlier?

21 A Yes. Some of them are, yes.

22 Q How long have cigarettes been referred to as
23 habit-forming or addictive as you said those terms were used
24 interchangeably?

25 A Well, tobacco in general was referred to as habit-forming
26 long before there were cigarettes. Cigarettes are relatively
27 recent, the 1880s, mass produced cigarettes. But cigarettes
28 themselves called "coffin nails" or "slavers" or "little brown

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1 imps," or pills, almost from the moment they appeared
2 commercially in the 1880s.

3 Q Regardless of the term that's been used -- and we see a
4 number of different terms displayed on your demonstrative --

5 has there been an awareness that cigarettes could be difficult
6 to quit?
7 A Yeah. I think all these terms speak to that.
8 Q And what is the significance of these types of
9 expressions as a historian?
10 A Well, I think what they say is that -- be it different
11 eras, the 1880s or 1980s, people recognize the same problem.
12 They might have used different words, but they recognize the
13 same hold that tobacco could have on its user.
14 Q And, Professor Schaller, going back to the types of
15 articles and research and things you've done, you mentioned
16 biographies. I just wanted to ask you a little detail
17 follow-up point on that.
18 I think you mentioned you have written a biography on
19 Regan and MacArthur?
20 A Yes.
21 Q Do biographies have a viewpoint when you write them?
22 A Usually, sure.
23 Q And biographies can be critical or they can be positive;
24 is that correct?
25 A Yeah. Yeah. A biography doesn't mean you love the
26 subject you're writing about. You might love to hate them, you
27 know. So they do have a point of view, yes, not necessarily
28 favorable.

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1 Q So a biography that you wrote could be, in fact, a
2 criticism of the person or critical of the person?
3 A Yeah. Well, you write a biography because you think
4 they're important, not necessarily because they're right or
5 good.
6 MS. KESSLER: Your Honor, I think we're at a good
7 breaking point for the evening.
8 THE COURT: Okay. We'll take the evening recess. We'll
9 start tomorrow at 9:00. Please don't discuss the case. Have a
10 nice evening. 9:00 o'clock tomorrow.
11 (Evening recess.)

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